power of granting charters. For if the old charter had been revoked, contends the court, the reinstatement amounts to the grant of a new charter by an executive officer. But it would seem that as the legislature has precisely defined under what circumstances the Governor may reinstate the corporation, such circumscribed power is no more than ministerial.[15] When ministerial acts are to be performed, their delegation is not unconstitutional.[16] And in this case where the Governor was authorized to reinstate a corporation on payment of a reasonable sum, in no case less than the amount of the fee required upon the filing of the original certificate of incorporation, the legislature has merely given the Governor executive functions.

It might seem that, having recognized the anomalous doctrine of *de facto* corporations, there would be no reason for not extending its effect to the present situation. It is true, it plays a large part in modern business operations, but the doctrine of *de facto* corporations is a dangerous one and must be guarded carefully. For, unrestrained, it might easily reach a point where as a practical matter, decrees of corporate dissolution would be impotent.

THE MEANING OF INTERSTATE COMMERCE IN THE FEDERAL EMPLOYERS' LIABILITY ACT.—The Federal Employers' Liability Act of 1906[1] was declared unconstitutional[2] for the reason that it applied to employees of interstate carriers, whether those employees were employed in interstate or intrastate commerce. The present Act of 1908,[3] however, providing that "every common carrier by railroad while engaged in commerce between any of the States or Territories . . . shall be liable in damages to any persons suffering injury while employed by such carrier in such commerce", has obviated that difficulty.[4] Plainly, by the terms of the statute, a right to recovery thereunder arises only where it appears that at the time of the injury, both the carrier and the employee were engaged in interstate commerce.[5] It is not sufficient that the employee was immediately

[15] Sec. 7 of the New Jersey Statute, *supra*, footnote 10.

[16] Jackson *v.* Whiting (1904) 84 Miss. 163, 36 So. 611; Schaake *v.* Dolley (1911) 85 Kan. 598, 118 Pac. 80; see Smith *v.* Wortham (Tex. 1913) 157 S. W. 740.

[1] 34 Stat. 232.

[2] The Employers' Liability Cases (1908) 207 U. S. 463, 28 Sup. Ct. 141.

[3] 35 Stat. 65, Comp. Stat. §8657.

[4] Second Employers' Liability Cases (1912) 223 U. S. 1, 32 Sup. Ct. 169.

[5] Pedersen *v.* D. L. & W. R. R. (1913) 229 U. S. 146, 33 Sup. Ct. 648. ". . . from the very nature of the question, his employer, at the moment of the injury, must be engaged in interstate commerce, not generally, but in the specific instance and in that identical commerce he (employee) must be injured if he recovers under the statute." Thornton, The Federal Employers' Liability and Safety Appliance Act, §28. "It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but . . . if the employee was engaged in such commerce, so was the road, for the road was the master, and the servant's act its act." Calasurdo *v.* Central R. R. of N. J. (C. C. 1910) 180 Fed. 832, 838.

previous to the injury so engaged,[6] or that his duties contemplated such an engagement after the performance of the service in the course of which the injury occurred,[7] although the requisite employment is established by proof that the employee was on the premises and acting under orders preparatory to engaging in interstate commerce, even though it may appear that he was not yet at his post.[8] For one to be engaged in interstate commerce by railroad, it is necessary for him to show that his work in some way is connected with the movement of an interstate train.[9] Just how close this relation must be, it is difficult to lay down with any precision. All that can be done is to examine and classify the wealth of cases which have arisen since Congress directed its attention to this matter and to endeavor to fit in any new set of facts with one group or the other.

Clearly a person engaged as one of a train crew in moving engine and rolling stock from one state to another is engaged in interstate commerce,[10] although the cars are empty,[11] are taken for the purpose of being repaired,[12] or are merely carrying coal and water to be used in the railroad's own engines.[13] Similarly, a switchman, engaged in a railroad division yard, in switching interstate cars loaded with freight and in transit from one state to another, is within the Act.[14] The distributing of cars from an interstate train and, incidentally, clearing the track for another interstate train, gives the required jurisdiction.[15] Again, an employee injured while engaged in switching an interstate car marked for repair, to a repair track[16]

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[6] Chicago, Burlington & Q. R. R. *v.* Harrington (1916) 241 U. S. 177, 36 Sup. Ct. 517.

[7] Ill. Central R. R. *v.* Behrens (1914) 233 U. S. 473, 34 Sup. Ct. 646.

[8] Lamphere *v.* Oregon R. & Nav. Co. (C. C. A. 1912) 196 Fed. 336. See N. Y. Central R. R. *v.* Carr (1915) 238 U. S. 260, 35 Sup. Ct. 780. But where the employee subject to be employed in either interstate or intrastate commerce as directed by a superior, was injured while in quest of orders and but for the injury would have received orders requiring him immediately to make up an interstate train, such injury was not within the Act. Erie R. R. *v.* Welch (1916) 242 U. S. 303, 37 Sup. Ct. 116.

[9] A train is interstate within the Act if it includes an interstate car. Niel *v.* Idaho & Washington N. R. R. (1912) 22 Idaho 74, 125 Pac. 331 (*semble*). A car is interstate if it contains but a single article of interstate commerce, although it does not go outside the state, Norfolk & Western R. R. *v.* Pennsylvania (1890) 136 U. S. 114, 10 Sup. Ct. 958; Thornton *op. cit.* §38, is empty, Malott *v.* Hood (1903) 201 Ill. 202, 66 N. E. 247, or is merely being delivered to make up a train, Mobile, *etc.* R. R. *v.* Blomberg (1904) 141 Ala. 258, 37 So. 395.

[10] Chesapeake & Ohio Ry. *v.* Proffitt (1916) 241 U. S. 422, 36 Sup. Ct. 620; Southern Ry. *v.* Gray (1916) 241 U. S. 333, 36 Sup. Ct. 558.

[11] North Carolina R. R. *v.* Zachary (1914) 232 U. S. 248, 34 Sup. Ct. 305.

[12] Chicago, Rock Island & Pac. Ry. *v.* Wright (1916) 239 U. S. 548, 36 Sup. Ct. 185.

[13] Barker *v.* Kansas City *etc.* Ry. (1913) 88 Kan. 767, 129 Pac. 1151.

[14] Rich *v.* St. Louis *etc.* R. R. (1912) 166 Mo. App. 379, 148 S. W. 1011.

[15] Seaboard Air-Line Ry. *v.* Koennecke (1915) 239 U. S. 352, 36 Sup. Ct. 126.

[16] Delk *v.* St. Louis *etc.* R. R. (1911) 220 U. S. 580, 31 Sup. Ct. 617.

or while engaged in cutting out an intrastate car from a mixed train so that the train may proceed on its interstate business, can recover under the federal Act.[17] It is also now well established that the work of repairing a car while part of an interstate train is interstate commerce.[18] Such repairing may be done on the completion of the interstate run in order to get the cars and engine ready for another run[19] or at a repair shop connected with an interstate track,[20] but where the repairs necessitate the withdrawal of the car or engine for a substantial period, the courts consider it as having been withdrawn from interstate commerce.[21]

A more difficult question is presented when we consider the status of employees engaged in work on appliances not part of the interstate train itself. Though once questioned, it is now generally recognized that employees engaged in repairing tracks, road-beds and bridges used in both interstate and intrastate commerce, can recover under the federal Act,[22] if at the time of the injury the structures had already become instrumentalities of interstate commerce.[23] Included in this class is such work as taking up or laying down rails,[24] repairing bridges,[25] trestles,[26] turn-tables[27] and switches;[28] ballasting the track;[29] clearing the track of debris from wreck[30] or snow;[31] excavating and deepening ditches along the track for drain-

[17] N. Y. Central R. R. *v.* Carr (1915) *supra,* footnote 8.

[18] Walsh *v.* N. Y., N. H. & H. R. R. (1912) 223 U. S. 1, 32 Sup. Ct. 169.

[19] Baltimore & Ohio R. R. *v.* Darr (C. C. A. 1913) 204 Fed. 751.

[20] Law *v.* Ill. Cent. R. R. (C. C. A. 1913) 208 Fed. 869.

[21] Minneapolis & St. Louis R. R. *v.* Winters (1917) 242 U. S. 353, 37 Sup. Ct. 170.

[22] N. Y. Central R. R. *v.* White (1917) 243 U. S. 188, 37 Sup. Ct. 247. The track of a railroad company used both in interstate and intrastate commerce is "while essential to the latter, indispensable to the former." See Interstate Commerce Commission *v.* Ill. Central R. R. (1910) 215 U. S. 452, 30 Sup. Ct. 185, and ". . . where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other." Zikos *v.* Oregon R. R. & Nav. Co. (C. C. 1910) 179 Fed. 893.

[23] Pedersen *v.* D. L. & W. R. R., *supra,* footnote 5. Employees engaged in new construction are not within the Act, although the structure, when completed, is to be used in interstate commerce. Jackson *v.* Chicago M. & St. P. Ry. (D. C. 1914) 210 Fed. 495; Bravis *v.* Chicago M. & St. P. Ry. (C. C. A. 1914) 217 Fed. 234.

[24] See Cherpeski *v.* Great Northern Ry. (1915) 128 Minn. 360, 150 N. W. 1091.

[25] McIntosh *v.* St. Louis & S. F. R. R. (1914) 182 Mo. App. 288, 168 S. W. 821.

[26] Louisville & Nashville R. R. *v.* Walker's Adm'r. (1915) 162 Ky. 209, 172 S. W. 517.

[27] Chesapeake & Ohio Ry. *v.* Kornhoff (1915) 167 Ky. 353, 180 S. W. 523.

[28] Calasurdo *v.* Central R. R. of N. J., *supra,* footnote 5.

[29] San Petro, Los Angeles, *etc.* R. R. *v.* Davide (C. C. A. 1914) 210 Fed. 870.

[30] Denver & Rio Grande R. R. *v.* Wilson (Cal. 1917) 163 Pac. 857.

[31] Hardwick *v.* Wabash R. R. (1914) 181 Mo. App. 156, 168 S. W. 328.

age purposes;[32] painting bridges[33] and repairing of telegraph and telephone lines of an interstate carrier.[34]

In two recent cases the United States Supreme Court was again called upon to pass on the question. In *Kinzell* v. *Chicago, Milwaukee and St. Paul Ry.* (1919) 250 U. S. 130, 39 Sup. Ct. 412, the court held that a workman employed, at the time of the injury, in clearing the track of an interstate railroad, of earth accumulated by the construction of a fill to take the place of a trestle, was engaged in interstate commerce and allowed to maintain an action under the Federal Statute. In the other case, *Philadelphia, Baltimore and Washington R. R.* v. *Smith* (1919) 250 U. S. 101, 39 Sup. Ct. 396; the court held that one employed as a mess cook and camp cleaner or attendant for a gang of bridge carpenters who travelled along the road to repair bridges and bridge abutments for an interstate railroad, could recover under the Federal Act for an injury sustained while cooking a meal in the camp car. Both cases are undoubtedly in line with the authorities cited.

It is contended, however, that if we do not limit the classes of employees engaged in interstate commerce to those connected with interstate transportation itself, then there is no logical reason why every servant of the interstate carrier should not be included.[35] It is nevertheless apparent that Congress intended to exert its authority over the subject matter to the fullest extent of its power.[36] Nor does it follow that by giving the Statute a broad interpretation, we must conclude that every employee of the interstate carrier is engaged in commerce between the states, for it is evident that still a number of these employees are so remotely and indirectly connected with the movement of interstate transportation that they do not fall within the reason of the act;[37] nor are many of them engaged in work of a hazardous character which, although not mentioned in the Act, seems to have had some effect in the decisions.[38] After all, as frequently happens, it would seem a question of degree and, as the Supreme Court has aptly pointed out, the matter must be viewed from a practical standpoint and not in a technical legal sense.[39]

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[32] Louisville & Nashville R. R. *v.* Blankenship (Ala. 1917) 74 So. 960.

[33] Louisville & Nashville R. R. *v.* Netherton (1917) 175 Ky. 159, 193 S. W. 1035.

[34] Coal & Coke Ry. *v.* Deal (C. C. A. 1916) 231 Fed. 604; Southern Pac. Co. *v.* Industrial Accident Commission (1916) 174 Cal. 19, 161 Pac. 1143.

[35] See the dissenting opinion of Lamar J., in Pedersen *v.* D. L. & W. R. R., *supra,* footnote 5, at p. 153.

[36] See Lamphere *v.* Oregon R. R. & Nav. Co. (C. C. 1911) 193 Fed. 248, reversed on other grounds (C. C. A. 1912) 196 Fed. 336. ". . . the act meant to include everybody whom Congress could include." Calasurdo *v.* Central R. R. of N. J., *supra,* footnote 5, at p. 837. But see Ruck *v.* Chicago M. & St. P. Ry. (1913) 153 Wis. 158, 164, 140 N. W. 1074.

[37] See Lamphere *v.* Oregon R. R. & Nav. Co., *supra,* footnote 36; Minneapolis & St. Louis R. R. *v.* Winters, *supra,* footnote 21.

[38] Thornton *op. cit.* §38.

[39] Shanks *v.* D. L. & W. R. R. (1916) 239 U. S. 556, 36 Sup. Ct. 188.

Thus, the courts have refused to hold as within the Act, employees engaged in repairing or reconstructing stations, roundhouses, machine shops and similar structures[40] or repairing engines and cars therein.[41] Employees engaged in such duties as are generally performed by watchmen, detectives and police officers in protecting and guarding property of the carrier, are usually not under the purview of the Act,[42] nor are clerks in the accounting department, ticket sellers and other employees of the general office.[43] Although the status of many of these last named employees has not been specifically passed upon by the Supreme Court, there is little doubt but what they will be excluded from the terms of the Act, the policy of the courts seeming to be to restrict its application to those whose work is a physical contribution to the physical movement of the trains.

PROSPECTIVE PROFITS AS DAMAGES.—It is rather generally agreed that there is nothing inherently objectionable in permitting profits to constitute, not only an element of, but often a measure of damages.[1] Being the subject of damages, they must conform with the general rules in respect of causation and manner of proof. They must not be special or remote, except where specifically or reasonably within the contemplation of the parties.[2] But the objection

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[40] Gallagher *v.* N. Y. Central R. R. (1917) 180 App. Div. 88, 167 N. Y. Supp. 480; Voris *v.* Chicago M. & St. P. R. R. (1913) 172 Mo. App. 125, 131, 157 S. W. 835; Shanks *v.* D. L. & W. R. R., *supra,* footnote 39.

[41] LaCasse *v.* New Orleans T. & M. R. R. (1914) 135 La. 130, 64 So. 1012.

[42] Chicago R. I. & P. Ry. *v.* Industrial Board of Illinois (1916) 273 Ill. 528, 113 N. E. 80; Alabama Great Southern R. R. *v.* Bonner (Ala. 1917) 75 So. 986. But such persons may under certain circumstances be within the Act. Atlantic Coast Line Ry. *v.* Jones (1913) 9 Ala. App. 499, 63 So. 693.

[43] Thornton *op. cit.* §38.

[1] In Brigham & Co. *v.* Carlisle (1884) 78 Ala. 243, at p. 249, the court said: "Profits are not excluded from recovery, because they are *profits;* but, when excluded, it is on the ground that there are no *criteria* by which to estimate the amount with the certainty on which the adjudications of the courts, and the findings of the jury should be based." And quoting from 3 Sutherland, Damages (1st ed.) 157, it continues: "'it is more a general truth than a general principle, that a loss of profits is no ground on which damages can be given.'" Masterton *v.* The Mayor (N. Y. 1845) 7 Hill 61, 69; Bagley *v.* Smith (1853) 10 N. Y. 489, 496; Gale *v.* Leckie (1817) 2 Stark. 107; see McNeil *v.* Reid (1832) 9 Bing. *68, *74; Ward *v.* Smith (1822) 11 Price 19, 26.

But it seems that some courts think that the very character of certain businesses or acts is such that their profits can never be sufficiently ascertained. Cain *v.* Vollmer (1910) 19 Idaho 163, 112 Pac. 686 (horse racing); Smitha *v.* Gentry (Ky. 1898) 45 S. W. 515 (information leading to capture of a criminal).

[2] Fell *v.* Newberry (1895) 106 Mich. 542, 64 N. W. 474; Somers *v.* Wright (1874) 115 Mass. 292, 298; Stewart *v.* Lanier House Co. (1885) 75 Ga. 582, 598; Vicksburg & M. R. R. *v.* Ragsdale (1872) 46 Miss. 458, 478; Walrath *v.* Whittekind (1881) 26 Kan. 482; Alamo Mills Co. *v.*